No. 79-1442

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1979

ASSOCIATED BUILDERS AND CONTRACTORS, INC., BALTIMORE METROPOLITAN CHAPTER, PETITIONER

v.

WILLIAM A. LUBBERS, GENERAL COUNSEL OF THE NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-13) is reported at 610 F. 2d 1221. The opinion of the district court (Pet. App. 15-22) is not officially reported.

JURISDICTION

The judgment of the court of appeals was entered on December 18, 1979 (Pet. App. 14). The petition for a writ of certiorari was filed on March 17, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the United States district courts have subject matter jurisdiction to review the General Counsel's refusal to issue a complaint.

STATUTE INVOLVED

Relevant provisions of the Administrative Procedure Act (5 U.S.C. 551 *et seq.*), and the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 88 Stat. 395, 29 U.S.C. 151 *et seq.*), are set forth at Pet. App. 30-34.

STATEMENT

In May 1976 the Baltimore Building and Construction Trades Council, AFL-CIO, and the Mass Transit Administration, an instrumentality of the Department of Transportation of the State of Maryland, entered into an agreement that required any contractor or subcontractor awarded work in the construction of the Baltimore Rapid Transit System to become signatory thereto. On December 13, 1976, petitioner, an association of building contractors, filed a charge with the Board's regional office in Baltimore, Maryland, alleging that the agreement violated Section 8(e) of the National Labor Relations Act, 29 U.S.C. 158(e) (Pet. 3). On May 13, 1977, the Regional Director informed petitioner that he was refusing to issue a complaint because the Mass Transit Administration, as a state governmental entity, was not an employer within the meaning of Sections 2(2) and 8(e) of the Act, 29 U.S.C. 152(2) and 158(e) (Pet. App. 25-28). On June 30, 1977, the General Counsel's Office of Appeals in Washington, D.C., denied petitioner's appeal of the Regional Director's determination for the reasons set forth by the Regional Director (Pet. App. 23).

Petitioner filed suit in the district court to compel the General Counsel to issue a complaint based on its charges (Pet. App. 15-16). On the General Counsel's motion, the district court dismissed the complaint for lack of

jurisdiction over the subject matter (Pet. App. 15-22). The court of appeals affirmed (Pet. App. 1-13). The court of appeals endorsed the general rule that "the General Counsel's refusal to issue a complaint is ordinarily not reviewable by federal courts," and found no reason to depart from that rule in this case, since the General Counsel, in determining that a complaint alleging a violation of Section 8(e) of the National Labor Relations Act could not issue against the Mass Transit Administration, had not exceeded his delegated authority in so construing the statute (Pet. App. 12).

ARGUMENT

Section 3(d) of the Act, 29 U.S.C. 153(d), provides that "[t]he General Counsel of the Board * * * shall have final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints * * *." Decisions of this Court, in the context of discussions of remedies under the National Labor Relations Act, have recognized that the General Counsel's decision not to issue a complaint is unreviewable. *Detroit Edison Co.* v. *NLRB*, 440 U.S. 301, 316 (1979); *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 138-139, 155 (1975); *Vaca* v. *Sipes*, 386 U.S. 171, 182 (1967). Courts of appeals have uniformly declined to sanction district court jurisdiction over the General Counsel's refusal to issue a complaint. See cases cited at Pet. 5-7 and cases cited by the court of appeals (Pet. App. 7 n.8, 10 n.9).

Petitioner acknowledges (Pet. 6) that "no court of appeal has yet upheld district court jurisdiction." However, petitioner urges that "statements" of various courts, by way of dicta, that a refusal to issue a complaint might be reviewable if the refusal were "wholly without

basis in law,"[1] or in violation of a statutory mandate[2] or constitutional right,[3] suggest a "confusion" that this Court should dispel by reviewing the decision in the present case. There is no merit to that argument.

Petitioner does not allege any violation of a constitutional right (Pet. 7). And the court of appeals concluded that the General Counsel's construction of the statute here was an allowable construction (Pet. App. 12). In these circumstances, no court of appeals would sanction district court jurisdiction.[4] There is thus no conflict between the circuits presented by this case.

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[1]*NLRB* v. *IBEW, Local 357*, 445 F. 2d 1015, 1016 n.2 (9th Cir. 1971). The court below also suggested such an exception (Pet. App. 11).

[2]*Saez* v. *Goslee*, 463 F. 2d 214, 215 (1st Cir.) cert. denied, 409 U.S. 1024 (1972); and see Pet. App. 10.

[3]*Balanyi* v. *Local 1031, IBEW*, 374 F. 2d 723, 726 (7th Cir. 1967); *United Electrical Contractors Ass'n* v. *Ordman*, 366 F. 2d 776 (2d Cir. 1966), aff'g 51 Lab. Cas. para. 19,761 (S.D.N.Y. 1965).

[4]Contrary to petitioner's contention (Pet. 10-13), the General Counsel's refusal to issue a complaint was reasonable and well within his discretion. The proscriptions of Section 8(e) apply only to a "labor organization" and an "employer" as those terms are defined in Section 2(2) and (5) of the Act. Section 2(2) specifically excludes "any State or political subdivison thereof." Nor is a different conclusion required by the fact that in *New York Electrical Contractors Ass'n*, 244 N.L.R.B. No. 46 (Aug. 20, 1979), in which the Board held that a state facility was not an "employer" within the meaning of Section 2(2), the Board repudiated its earlier decision that a Railway Labor Act employer was subject to the proscriptions of Section 8(e) (*Intl. Assn. of Machinists & Aerospace Workers and Lufthansa German Airlines*, 197 N.L.R.B. 232 (1972), enf'd sub nom. *Marriott Corp.* v. *NLRB*, 491 F. 2d 367 (9th Cir.), cert. denied, 419 U.S. 881 (1974)). The Board's change of position does not establish an abuse of discretion on the part of the General Counsel; it indicates, if anything, that the General Counsel's determination was a reasonable one in a complex area of the law. See *Panama Canal Co.* v. *Grace Line, Inc.*, 356 U.S. 309, 318 (1958).

Contrary to petitioner's suggestion (Pet. 8), the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.*, does not provide a basis for judicial review here. That Act "does not afford an implied grant of subject-matter jurisdiction permitting federal judicial review of agency action." *Califano* v. *Sanders*, 430 U.S. 99, 107 (1977). Nor does 28 U.S.C. 1337 make review available here "within * * * parameters established by the APA" (Pet. 8). The APA expressly makes its procedures inapplicable where "agency action is committed to agency discretion by law" (5 U.S.C. 701(a)(2)) and where "statutes preclude judicial review" (5 U.S.C. 701(a)(1)). As noted above, the courts have uniformly construed Section 3(d) of the National Labor Relations Act to preclude review of the General Counsel's refusal to issue a complaint, at least where, as here, it cannot be shown that the General Counsel has clearly exceeded his statutory authority.[5]

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[5]Thus petitioner's assertion (Pet. 9) that judicial review is not foreclosed merely because agency discretion exists is not to the point. Judicial review of an agency officer's abuse of discretion is permissible in some circumstances, but only where such review is consistent with the scheme of the statute conferring discretion. Compare *Dunlop* v. *Bachowski*, 421 U.S. 560, 566-567 (1975), with the discussion of the legislative history of Section 3(d) in the opinion of the court of appeals (Pet. App. 6-7).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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